STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
Wilder, PJ, Fitzgerald and Zahra, JJ.

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

No.125375

vs.

MARLON BELL,
Defendant-Appellee.

Lower Court No.99-009228
COA No. 233234

APPELLANT'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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Summary of Argument

The trial judge here denied two defense peremptory challenges by finding them racially motivated without calling for an explanation for the strikes. Explanation was given subsequently in both situations, and that explanation was race-conscious not race-neutral. In this situation, the trial judge's failure to call for an explanation before reaching a conclusion was rendered harmless, as there was no judgment required by the court as to whether a race-neutral reason was a pretext.

Even if the court's actions are viewed as error, the jury that sat was impartial. There is no claim that a challenge for cause was improperly denied. Peremptory challenges are auxiliary to the challenge for cause and are not constitutionally required. The substantial right possessed by the defendant is the right to an impartial jury. When that right has not been violated, procedural error in the selection of the jury cannot work a miscarriage of justice and thus cannot provide a basis for reversal of an otherwise valid conviction. To the extent *People v Miller*, infra, requires a contrary conclusion, it should be overruled.

Statement of the Question

I.

The accused has the substantial right to trial by an impartial jury, which may be impaneled though peremptory challenges are erroneously denied. The trial judge denied defense counsel the exercise of two peremptory challenges without following the procedure mandated by *Batson,*[1] though defense counsel made a record giving race-conscious reasons for the challenges. If *People v Miller*[2] requires reversal for this error without any showing of prejudice, should this Court reconsider *Miller*?

The People answer: YES

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[1] *Kentucky v Batson*, 476 US 79, 106 S Ct 1712, 90 L Ed 2d 69 (1986).

[2] *People v Miller*, 411 Mich 321 (1981).

Statement of Facts

In July of 1999 Chanel Roberts and Amanda Hodges were brutally murdered, execution-style, in a robbery for several thousand dollars. Defendant was convicted by a jury of two counts of first-degree murder, two counts of armed robbery, and a count of conspiracy to commit armed robbery for his participation in the crime.

The Court of Appeals initially affirmed, but on rehearing reversed. The court reversed on the ground that the trial judge, in precluding defense counsel from exercising two peremptory challenges on the ground that they were racially motivated, had failed to follow the procedure mandated by the United States Supreme Court (see lead opinion of Judge Fitzgerald). The panel found the error not subject to harmless error review based on this court's decision in *People v Miller*, infra. Two members of the panel, Judges Zahra and Wilder, concurred, expressly inviting this court to grant leave to appeal in order to reconsider *Miller* (see concurring opinion); were it not for that opinion and its progeny, they would have affirmed.

During jury selection on November 7, 2000, defense counsel exercised a peremptory challenge with regard to juror no. 2, Scott Denman (28a, 66a); juror no. 3, John Hayes (28a, 68a); juror no. 12, Mark Lavrack (46a, 69a); juror no. 9, Lauren Bellman (28a, 74a); juror no. 9, Gloria Callahan (28a, 77a); juror no. 5, Derek Wilson (76a, 79a); juror no. 5, Gerald Ronewicz (82a, 84a); juror no. 5, Patrick Ortega (106a), and attempted to challenge juror no. 10, Michael Anderson (113a). The trial court interrupted and the court and counsel

proceeded to chambers. There the court stated that it was disallowing the challenge to juror number 10 because "the Court has determined, from the challenges for this jury for the better part of all day today, that...the defense attorney...is exercising challenges based on the race of the jurors." The court reached this conclusion because "the only thing that we have had in this case has been that white, male jurors are being excused. And this Court is [sic: has] determined that racism is being used in jury selection" (114a). The court initially refused to allow defense counsel even to make a record, but relented on defense counsel's vociferous objection (114a).

Defense counsel then made his record:

> I would bring to the court's attention that the number of white males on that panel still exceeds the number of the minorities on that panel. Why don't you talk about the whole racial composition of that panel? There's still a vast majority of white members on that panel than it is black members on that panel (115a)

The trial judge responded: "So, all right. So, he has actually supported – you've actually supported what I said. You want more racial members on the panel – "(115a).

Jury selection continued. After several more defense peremptory challenges the prosecutor objected when the defense attempted to excuse Mr. Wenzel, juror no. 5 (126a). The trial judge disallowed the challenge "for the same reasons as before" (127a). The prosecutor asked to approach and the court excused the jury to "make a record." The prosecutor noted that the two defense strikes prior to the strike on juror no. 5 were white males, and though she could perceive race-neutral reasons for the strikes, believed the third

consecutive strike on a white male, Mr. Wenzel, was racially based (128a). She stated her view that defense counsel wanted to "excuse any white males...."(128a). Defense counsel responded that the objection "might have some application, judge, if there were no other white males on this jury. There still remains either an even number of white males as black males on this jury, if not, a majority of white males then (sic) black males on this jury" (128a). Counsel then gave race-neutral reasons for the previous two strikes (128-129a). The court answered that these had been allowed; it was the final strike with which he was concerned (129a). With regard to this strike counsel responded: "again, if there were no other white males on that jury, or white males were a minority on that jury, then there may be some persuasive force to Ms. Westveld's argument...That simply is not the case. The demographics of that jury do not hold up to that kind of a challenge" (130a). The strike was not allowed.

Argument

I.

The accused has the substantial right to trial by an impartial jury, which may be impaneled though peremptory challenges are erroneously denied. The trial judge denied defense counsel the exercise of two peremptory challenges without following the procedure mandated by *Batson,* though defense counsel made a record giving race-conscious reasons for the challenges. If *People v Miller* requires reversal for this error without any showing of prejudice, this Court should reconsider *Miller.*

"*The quest for the perfect is the enemy of the good.*"[3]

I. Introduction: The Court of Appeals Opinion [4]

A. <u>The Lead Opinion</u>

The Court of Appeals found that the trial judge erred in precluding defense counsel from exercising peremptory challenges with regard to jurors number 10 and 5. The trial judge erred, the panel found, in concluding that the challenges were racially motivated while collapsing the required three-step inquiry[5] into counsel's conduct into one step. Rather than determining that a prima facie showing of discriminatory use of the peremptory challenges

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[3] *United States v Underwood*, 130 F3d 1225, 1227 (CA 7, 1997).

[4] *People v Bell (On Rehearing)*, 259 Mich App 583 (2003).

[5] See e.g. *Purkett v Elam*, 514 US 765, 115 S Ct 1769, 131 L Ed 2d 834 (1995); *Miller-El v Cockrell*, 537 US 322, 123 S Ct 1029, 154 L Ed 2d 931 (2003); *Hernandez v New York*, 500 US 352, 111 S Ct 1859, 114 L Ed 2d 395 (1991).

had been made,[6] then calling for an explanation, and then determining whether that explanation, was a pretext, the court determined from the pattern of the strikes that "racism" was involved, in effect both finding a prima facie case of discrimination and rejecting any explanation before one was offered, and precluded the two strikes. This, concluded the court, was error.

Writing the lead opinion for the court, Judge Fitzgerald concluded that no inquiry into prejudice caused by this error is allowed by this court's decision in *People v Miller*,[7] citing also to the reversal of the conviction for erroneous denial of a peremptory challenge in *People v Schmitz*,[8] and the holding there that this sort of error is not subject to harmless-error analysis. The opinion also suggested that reversal without any inquiry into prejudice is required by the decision of the United States Supreme Court in *Swain v Alabama*[9] and the "weight" of federal authority on the point.

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[6] The People would insist that the conclusion of the Court of Appeals that "While the prosecution claims on appeal that there was a pattern of discrimination because '[o]f seven defense peremptory challenges made, five were against white males,' we cannot find support for the conclusion that defendant's counsel was acting with a discriminatory motive because the trial court did not make a record of the racial identities of the members of the jury pool" is mistaken. See 259 Mich App at 591. While the trial judge may not have identified the race of each juror *by name*, he stated that *all* the males struck by the defense were white, and defense counsel not only did not disagree, but defended the strikes on the ground that there were still many white males on the jury. The statement by the trial judge that all the males challenged by the defense were white is an unrebutted factual finding, establishing a prima facie case of discrimination.

[7] See footnote 2.

[8] *People v Schmitz*, 231 Mich App 521 (1998).

[9] *Swain v Alabama*, 380 US 202, 85 S Ct 824, 13 L Ed 2d 759 (1965).

B. The Concurring Opinion

Judge Zahra wrote a concurring opinion for himself and Judge Wilder. These members of the panel concurred only because they felt required to do so by *Miller* and by *Schmitz*. If unencumbered by these decisions, they would have found that the error was nonconstitutional in nature and that no miscarriage of justice had been demonstrated. They urged this court to grant leave to appeal to address whether "*Miller* should be expressly overruled and whether the wrongful denial of the right to remove a particular juror peremptorily amounts to structural error not subject to harmless error analysis."[10] This court granted leave.

II. Miller Should Be Overruled

Miller should be overruled. The case was decided before this court in a series of opinions distinguished constitutional error from nonconstitutional error, preserved from unpreserved error, issue forfeiture from issue waiver, and looked with disfavor on "automatic" reversal rules.[11] In that case–a 4-3 per curium opinion issued in lieu of granting leave to appeal–the trial judge employed the so-called "struck" method of jury selection, where peremptory challenges and challenges for cause are directed to the entire array, and

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[10] 259 Mich App at 598; see also the penultimate and final sentences on p. 606-607.

[11] See e.g. *People v Grant*, 445 Mich 535 (1994); *People v Lukity*, 460 Mich 484 (1999); *People v Carines*, 460 Mich 750 (1999); and this court has "embraced the notion that 'rules of automatic reversal are disfavored.' *People v. Mosko,* 441 Mich. 496, 502, 495 N.W.2d 534 (1992). See also *People v. Graves,* 458 Mich. 476, 481, 581 N.W.2d 229 (1998); *People v. Belanger,* 454 Mich. 571, 575, 563 N.W.2d 665 (1997)." *People v. Green*, 241 Mich.App. 40, 46 (2000).

after the challenges are exhausted the first fourteen jurors called into the box constitute the jury. This procedure violates the court rule,[12] and though the majority agreed that "there is nothing in this record from which one could affirmatively find prejudice," the court nonetheless reversed because of the "inherent difficulty of evaluating such claims" so that "a requirement that a defendant demonstrate prejudice would impose an often impossible burden."[13] The dissenting justices would have found no prejudice (though condemning the violation of the court rule).

Miller's "automatic reversal" rule for a nonconstitutional error has been rendered obsolete by the cases, cited above, disfavoring automatic reversal–even for constitutional error. The People are aware of no precedent identifying an error as "structural" so as to require no showing of prejudice where the error is not of constitutional dimension.[14] Indeed, *Swain*, relied on by Judge Fitzgerald, does not compel a rule of automatic reversal, as it suffers from the same defect as *Miller*. The United States Supreme Court itself has said that "the oft-quoted language in *Swain* [that reversal is required for erroneous impairment of the ability to exercise a peremptory challenge] was not only unnecessary to the decision in that

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[12] Then GCR 511.6.

[13] 411 Mich at 326.

[14] See e.g. *Green v United States,* 262 F3d 715, 719 (CA 8, 2001): "Structural errors appear to be confined to the constitutional sphere because Congress has mandated the application of harmless error review by statute. *See* 28 U.S.C. § 2111 (requiring the circuit courts to disregard "errors or defects which do not affect the substantial rights of the parties"). Presumably, only grave constitutional errors could surmount the statutory default rule that harmless error analysis applies." Similarly, MCL 769.26 requires that this court disregard errors that do not work "a miscarriage of justice." See also *People v Lukity*, supra.

case...but was *founded on a series of our earlier cases decided long before the adoption of harmless-error review.*"[15] Precisely so with *Miller*.

Miller should thus be overruled, as it has impliedly been overruled by this court's intervening decisions.[16] But this case does not involve use of the struck method of jury selection, but a different error in the jury selection process. The question remains, then, whether the error that occurred in this case should require reversal, even if *Miller* is overruled.

III. The Erroneous Denial of a Peremptory Challenge Does Not Work A Miscarriage of Justice

A. The Record In This Case Demonstrates The Error Was Harmless

When defense counsel "thanked and excused" juror number 10, the trial court interrupted and repaired with counsel to chambers. There, without first providing defense counsel an opportunity to explain his peremptory challenges, the court stated that it was disallowing the challenge to juror number 10 because "the Court has determined, from the challenges for this jury for the better part of all day today, that...the defense attorney...is exercising challenges based on the race of the jurors." The court reached this conclusion

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[15] *United States v Martinez-Salazar*, 528 US 304, 317, fn 4, 120 S Ct 774, 145 L Ed 2d 792 (2000)(emphasis and bracketed material supplied).

[16] And in contexts outside of the "struck method," *Miller* has already been limited. See e.g. *People v Fletcher*, 260 Mich App 531, 555-556 (2004): "Thus, although the *Miller* Court's disapproval of the 'struck jury method' still remains viable, MCR 2.511(A)(4) obviously affects *Miller's* rule of automatic reversal with respect to deviations from the standard jury selection procedure that do not implicate a 'struck jury method' or defendant's right to exercise peremptory challenges pursuant to MCR 2.511(F)."

because "the only thing that we have had in this case has been that white, male jurors are being excused. And this Court is [sic: has] determined that racism is being used in jury selection."[17] The court initially refused to allow defense counsel even to make a record, but relented on defense counsel's understandably vociferous objection.[18]

The record made by defense counsel reveals that though the trial court erred in collapsing the *Batson* inquiry into one step, that error was harmless, for defense counsel gave a reason that was *not* race-neutral, requiring no determination by the trial judge as to whether it was pretextual. In short, counsel's reason for his strike fulfilled both steps 2 and 3 of the *Batson* inquiry:

> I would bring to the court's attention that the number of white males on that panel still exceeds the number of the minorities on that panel. Why don't you talk about the whole racial composition of that panel? There's still a vast majority of white members on that panel than it is black members on that panel.

The trial judge immediately recognized that counsel's rationale for his strikes was not race-neutral: "So, all right. So, he has actually supported – you've actually supported what I said. You want more racial members on the panel –"[19] Counsel never disputed that his purpose in exercising the challenge was to attempt to "even out" or better "balance" the jury panel in racial terms.

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[17] 114a.

[18] "Well, this is garbage." 114a..

[19] 115a.

With regard to juror number 5, when the third consecutive white male was struck, the prosecutor objected, and the trial judge disallowed the challenge "for the same reasons as asserted before." Again, a record was made after the fact. Defense counsel indicated the reasons for the first two strikes, which were race-neutral, and the trial court indicated it had no problem with those strikes. When the trial court stated that "[T]he issue is the last juror," counsel responded that "again, if there were no other white males on that jury, or white males were a minority on that jury, then there may be some persuasive force to Ms. Westveld's argument...That simply is not the case. The demographics of that jury do not hold up to that kind of a challenge."[20] Unlike the previous two strikes, defense counsel gave as a reason for the final strike only the racial composition of the jury.

In this case, then, the trial judge concluded that the two challenges were based on race without hearing counsel's reasons for them. Had counsel been allowed to give his reasons after-the-fact, and given race-neutral reasons, an argument that a finding of pretext was prejudged and unfair might have some force. But here defense counsel's reason for the strikes, even though given after the fact, was not of the sort that required judgment by the court. Defense counsel was admittedly exercising his strikes on a race-conscious basis in order to achieve what he believed was a more racially-balanced jury, which he considered, apparently, was of benefit to his client. But this is simply not permitted by the law.

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[20] 126-130a..

Under *Batson* and its progeny, there simply *is no* benign or permissible use of race as a ground for exercising a peremptory challenge. There can be no question after *Georgia v McCollum*[21] that the race-conscious exercise of a peremptory challenge on the basis that there is a majority of jurors of a different race than the accused (or, on the part of the prosecutor, than of the victim), so as to "even out" or "balance" the jury in racial terms, constitutes invidious discrimination. The Supreme Court in *McCollum* said, in extending *Batson* to defense peremptory challenges, that

> denying a person participation in jury service on account of his race unconstitutionally discriminates against the excluded juror....While '[a]n individual juror does not have a right to sit on any particular petit jury, ... he or she does possess the right not to be excluded from one on account of race.'Regardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same–in all cases, the juror is subjected to open and public racial discrimination.
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> *****
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> "[B]e it at the hands of the State or the defense," if a court allows jurors to be excluded because of group bias, "[it] is [a] willing participant in a scheme that could only undermine the very foundation of our system of justice– our citizens' confidence in it.[22]

Though the trial judge erred in not calling for defense counsel's reasons for the two peremptory challenges at issue before finding them race-based, counsel then *did* give a

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[21] *Georgia v McCollum* 505 US 42, 112 S Ct 2348, 120 L Ed 2d 33 (1992).

[22] *McCollum,* 505 US at 49-50, 112 S Ct at 2354.

reason, and that reason *was* race-conscious.[23] There was thus no need for the trial court to make a determination of whether a race-neutral reason given was a pretext for a race-based challenge, as the trial court's premature determination was confirmed, and the error in procedure rendered harmless.

B. The Loss Of A Peremptory Challenge Is Not Reversible Error

One criminally accused has a right under both the state[24] and federal[25] constitutions to trial by an impartial jury. Challenges for cause are designed to secure this right; persons who may be biased by circumstances, such as relationship to a party, and those expressing

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[23] And see *United States v Nelson*, 277 F3d 164, 207 -208 (CA 2, 2002):

> What the district court did in its effort to achieve a racially and religiously balanced jury was unquestionably highly unusual. It was also improper. The error is made plain by the reasoning behind *Batson v. Kentucky*...and *Georgia v. McCollum*..., in which the Supreme Court held that neither prosecutors nor defendants could, without violating the Equal Protection Clause, exercise peremptory strikes on the basis of race. ....And what the district court could not allow the parties to do, it also could not do of its own motion even with the consent of the parties....although the motives behind the district court's race- and religion-based jury selection procedures were undoubtedly meant to be tolerant and inclusive rather than bigoted and exclusionary, that fact cannot justify the district court's race-conscious actions. The significance of a jury in our polity as a body chosen apart from racial and religious manipulations is too great to permit categorization by race or religion even from the best of intentions.

[24] "In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury...." Const 1973, Art. 1, § 20.

[25] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..." United States Const., Amend. VI.

a bias, are disqualified from service.[26] Peremptory challenges, on the other hand, though possessing a venerable pedigree, are nonetheless auxiliary to the challenge for cause. "Unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension. ...('There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges')."[27] Even before its recent decision in *Martinez-Salazar,* the United States Supreme Court considered the situation where defense counsel is required to expend a peremptory challenge to remove a juror who should have been removed on counsel's challenge for cause:

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[26] MCR 2.511(D): "...A juror challenged for cause may be directed to answer questions pertinent to the inquiry. It is grounds for a challenge for cause that the person:

(1) is not qualified to be a juror;
(2) has been convicted of a felony;
(3) is biased for or against a party or attorney;
(4) shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be;
(5) has opinions or conscientious scruples that would improperly influence the person's verdict;
(6) has been subpoenaed as a witness in the action;
(7) has already sat on a trial of the same issue;
(8) has served as a grand or petit juror in a criminal case based on the same transaction;
(9) is related within the ninth degree (civil law) of consanguinity or affinity to one of the parties or attorneys;
(10) is the guardian, conservator, ward, landlord, tenant, employer, employee, partner, or client of a party or attorney;
(11) is or has been a party adverse to the challenging party or attorney in a civil action, or has complained of or has been accused by that party in a criminal prosecution;
(12) has a financial interest other than that of a taxpayer in the outcome of the action;
(13) is interested in a question like the issue to be tried.

[27] *United States v Martinez-Salazar,* 528 US at 311, 120 S Ct at 779.

> Petitioner was undoubtedly required to exercise a peremptory challenge to cure the trial court's error. But we reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. We have long recognized that peremptory challenges are not of constitutional dimension....They are a means to achieve the end of an impartial jury. *So long as the jury that sits is impartial*, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.[28]

Judge Zahra's opinion in this case, then, stating that the "Error in this case is... nonconstitutional error that is subject to harmless error analysis" goes to the heart of the matter, for unless a dilution of the nonconstitutional peremptory challenge, provided by statute and court rule, somehow itself becomes constitutional error, this court is obliged to review the error here in the context of the statute, MCL 769.26, enacted by the same legislative body that has provided for the peremptory challenge–reversal, then, is only permitted upon an affirmative showing of a miscarriage of justice.[29]

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[28] *Ross v Oklahoma*, 487 US 81, 88, 108 S Ct 2273, 2278, 101 L Ed 2d 80 (1988).

[29] As Judge Zahra well put it, "The statutory provision granting peremptory challenges must be read in context with the statutory directive on procedural error in a criminal case. It is apparent that, to the extent that the statutory right to peremptory challenges is impaired, state law guarantees that a criminal conviction will only be set aside where the error results in a miscarriage of justice. Thus, because state law dictates that a harmless error analysis must apply to procedural errors, such as errors involving peremptory challenges, the erroneous denial of the statutory right to remove a particular juror peremptorily, without more, cannot be a violation of the constitutional guarantee of due process of law." *People v Bell*, 259 Mich App 583, 601 (2003).

The point has been nicely stated by an illustrious panel of the seventh circuit court of appeals in *United States v Patterson*.[30] Because of a complicated calculation error in the determination of peremptory challenges, defendant was denied several peremptory challenges, receiving fewer than provided by statute. He claimed that this error required reversal without consideration of the question of prejudice. Writing for himself and Judges Posner and Wood, Judge Easterbrook disagreed:

> - Defendants respond that an error concerning a peremptory challenge always affects a "substantial" right. *A right is "substantial" when it is one of the pillars of a fair trial.*
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> - Trial before an orangutan, or the grant of summary judgment against the accused in a criminal case, would deprive the defendant of a "substantial" right even if it were certain that a jury would convict. ...
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> - For the same reason, a biased tribunal always deprives the accused of a substantial right....Deprivation of counsel likewise so undermines the ability to distinguish the guilty from the innocent that it always leads to reversal....
>
> - But "if the defendant had counsel and *was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis.*" *It is impossible to group an error concerning peremptory challenges with the denial of counsel or trial before a bribed judge.*
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> - When the jury that actually sits is impartial, as this one was, the defendant has enjoyed the *substantial* right. Peremptory challenges enable defendants to feel more comfortable with the jury that is to determine their fate, but increasing litigants'

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[30] *United States v Patterson*, 215 F3d 776 (CA 7, 2000), vacated in part on other grounds, 531 US 1033, 131 S Ct 621, 148 L Ed 2d 531 (2000).

> comfort level is only one goal among many, and reduced peace of mind is a bad reason to retry complex cases decided by impartial juries.[31]

A distinction has sometimes been drawn between the "dilution" of the statutory number of peremptory challenges and the "denial" of the exercise of a peremptory challenge. A dilution occurs when a challenge for cause is denied improperly, and the defendant is forced to employ a peremptory challenge to excuse the juror. After *Martinez-Salazar* it is clear that no cognizable prejudice occurs in this circumstance; error can only occur if the improper denial of the challenge for cause occurs after all peremptory challenges are exhausted, for then the claim is a constitutional one, that is, that the Sixth Amendment right itself has been violated, as a juror who was *not impartial* sat. A denial of an exercise of a peremptory challenge occurs either, as in this case, by the refusal by the trial court to allow a strike to be made, or by a miscount, so that the defendant is permitted to exercise fewer challenges than permitted under the applicable statute or court rule. Judge Fitzgerald's

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[31] *United States v Patterson*, 215 F3d 776, 781 (CA 7, 2000), vacated in part on other grounds, 531 US 1033, 131 S Ct 621, 148 L Ed 2d 531 (2000)(all but the final emphasis supplied, citations omitted). Note also that with regard to application of the statutory requirement that reversal not occur unless a substantial right was impaired the panel pointed to *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984), where a juror's failure to respond to a question on voir dire deprived a party of information that would have been useful in exercising a peremptory challenge and observed that "the Court concluded that reversal would not be justified unless a correct response by the juror 'would have provided a valid basis for a challenge for cause.' ... The Court recognized the importance of information to the intelligent exercise of peremptory challenges but concluded that '[t]he harmless-error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial.'"

opinion in the present case appears to view a denial as more serious than dilution, a point with which Judge Zahra's opinion concurring for himself and Judge Wilder agrees; however, as Judge Zahra observes, "I do not conclude that this distinction converts a statutory right into a constitutional right. Not all important rights are constitutionally guaranteed. Likewise, not all violations of important rights rise to constitutional violations."[32] Moreover, the error in *Patterson* was a *denial* of the full complement of peremptory challenges through a miscount. If a defendant must exercise a peremptory challenge to excuse a juror who should have been excused on his or her challenge for cause, if a defendant is given his or her full complement of peremptory challenges but is improperly denied the exercise of a challenge as to a particular juror,[33] or if a defendant is denied the exercise of his or her full complement of challenges because of a miscount or computational error, as in *Patterson*, so long as the jury that sits is impartial, no substantial right of the defendant has been denied, and certainly no miscarriage of justice can be demonstrated.

This court should follow *Patterson*. There is some authority for the proposition that the erroneous denial of a peremptory challenge is constitutional error; that authority is at best superficial in its reasoning, at worst casual, failing to understand that not every deviation from required state procedures can "be viewed as a federal constitutional violation," for such

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[32] *Bell*, at 601.

[33] And again, in the present case it was the procedure that was improper; counsel's statement of his reason for striking the jurors demonstrates that the procedural error was harmless and the trial judge's disallowance of the strikes appropriate.

a doctrine would "make a large volume of state...judicial proceedings subject to complaint in the federal courts on due process grounds,"[34] converting ordinary claims of violation of state procedural requirements into constitutional claims. An example is *Aki-Khuam v Davis*.[35]

The error of the trial judge in *Aki-Khuam* –a death-penalty case– was more serious than that in the present case (here the trial judge in essence prejudged whether a race-neutral reason could be given for the defense strikes, only to be confirmed in his conclusion by the record made by defense counsel), for in *Aki-Khuam* the trial judge required *more* than a race-neutral reason to justify the challenges:

> ...the trial court rejected Petitioner's race-neutral explanations not because they demonstrated a discriminatory motive, but rather because the trial court found the reasons, "terrible,"unsupported in the record, based on a prospective juror's response to a "trick question," or due to defense counsel's introduction of the work "slickster."[36]

But the conclusion of the court that the misapplication of *Batson* and its progeny was reversible error is at once superficially reasoned and internally inconsistent. The panel stated its *ipse dixit* that the error violated the accused's "due process and equal protection rights" by depriving him of "his statutory right to exercise peremptory challenges" for any reason

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[34] See e.g. *Bills v Henderson*, 631 F2d 1287, 1298 (CA 6, 1980).

[35] *Aki-Khuam v Davis*, 339 F3d 521 (CA 7, 2003). The opinion, somewhat curiously, arises from the same circuit as *Patterson*, but the opinions share no panel members.

[36] 339 F3d at 527.

other than a discriminatory one. Though there was neither a claim nor a finding that the jury was not impartial, the panel, without discussing principles of prejudice or harmless error, found that because the jury was created in a manner that violated statutory requirements by denying an arguably race-neutral peremptory challenge, reversal followed, apparently automatically, though the panel never denominated the error as "structural" or in any way discussed prejudice –except in a footnote, where, in outlining that which it was *not* saying, the panel contradicted its failure to discuss principles of prejudice and harmless error:

> We are careful to note that today's decision...should not be read to hold that (i)the Constitution provides a per se right to peremptory challenges, (ii) the Constitution per se requires states to adhere to their own rules of trial procedure, or (iii) the harmless-error doctrine is inapplicable.[37]

And it is in this footnote that the panel's entire harmless-error analysis appears: the error "was not harmless."[38]

The unreasoned conclusions reached in *Aki-Khuam*[39] cannot be squared with the reasoned analysis of *Patterson* that where the defendant was "tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are

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[37] 339 F3d at 529, fn 6.

[38] 339 F3d at 529, fn 6.

[39] The panel's conclusion that the state could not provide greater protections for jurors than mandated by *Batson* is also fundamentally mistaken. So long as applied equally to both prosecution and defense, there is absolutely no constitutional impediment to the state creation of a peremptory challenge system that contains different methods than required by the constitution for establishing a prima facie case of discrimination, different allocations of the burden of proof, or even that establishes a "quasi-challenge for cause" as a required justification for a strike, if the state chooses to create such a system (or to abolish the peremptory challenge altogether).

subject to harmless-error analysis," for "[I]t is impossible to group an error concerning peremptory challenges with the denial of counsel or trial before a bribed judge. When the jury that actually sits is impartial, as this one was, the defendant has enjoyed the substantial right. Peremptory challenges enable defendants to feel more comfortable with the jury that is to determine their fate, but increasing litigants' comfort level is only one goal among many, and reduced peace of mind is a bad reason to retry complex cases decided by impartial juries." In other words, peremptory challenges exist to assist in the empaneling of an impartial jury, which is the substantial right enjoyed by the accused; where error occurs in the exercise of peremptory challenges that does not somehow cause the seating of a partial jury, that error does not affect a substantial right. In the terms of the Michigan statute, it does not work a "miscarriage of justice" to affirm the conviction of one whose guilt was determined by an impartial jury, even if peremptory challenges were denied as to some jurors, or altogether, as in the case of a miscount.

Also well making the point, and presaging *Patterson*, is the discussion of Judge Easterbrook dissenting from the denial of rehearing en banc in *United States v Underwood*,[40] a case recognized as of no force after *Martinez-Salazar*.[41] The panel reversed because of a

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[40] *United States v Underwood*, 130 F3d 1225 (CA 7, 1997).

[41] The panel decision is found at *United States v Underwood*, 122 F3d 389 (CA 7, 1997); see *United States v Jackson*, 2001 WL 388852, 2 (S.D.Ind.,2001): "The bottom line is that *Underwood's* discussion of the need for a clear understanding of the peremptory challenge process remains good law, but the automatic reversal standard is no longer applicable."

confusion in the jury-selection process that prevented defense counsel from making "the most advantageous use of their peremptory challenges." The panel did not find that the error was prejudicial under the federal statute precluding relief unless the error affects a substantial right, but believed reversal required by the dicta in *Swain v Alabama,* since repudiated in *Martinez-Salazar*, as noted previously. Anticipating *Martinez-Salazar* by almost three years, Judge Easterbrook for himself and Judges Posner, Manion, and Evans, noted that "[P]erfection is elusive" and in review of trials for error "the quest for the perfect is the enemy of the good."[42] The panel, said Judge Easterbrook, had no authority to reverse without applying FRCP 52(a), providing that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded," for the rule (which in the federal system is passed by Congress and is thus in effect a statute) "does not except errors affecting peremptory challenges. *Any* error that does not affect substantial rights *shall* be disregarded."[43]

But perhaps the error that occurs when a peremptory challenge is denied erroneously is "structural," so that no inquiry into prejudice is permitted. This was the holding of the Ninth Circuit in *United States v Annigoni*,[44] where the trial court disallowed a peremptory

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[42] 130 F3d at 1227.

[43] 130 F3d at 1227.

[44] *United States v Annigoni* (en banc), 96 F3d 1132 (CA 9, 1996).

challenge on *Batson* grounds without finding that the strike was racially motivated. The majority of the court found that it was not bound to apply FRCP 52(a) because automatic reversal for denial of a peremptory challenge was a rule of "long standing," and the error is not susceptible to "quantitative assessment" in the "context of other evidence presented" in order to determine whether it was harmless. Judge Kozinski in dissent concluded that, on the contrary, because the error in the denial of the peremptory challenge does not affect the substantial right afforded by the constitution –an impartial jury– "I find it hard to believe that the [Supreme] Court would now conclude that it's always reversible error to deny a defendant a mere statutory right."[45]

That Judge Kozinski was correct and *Annigoni* and like cases[46] wrong is demonstrated by the later United States Supreme Court decision in *Johnson v United States*.[47] There the Supreme Court firmly rejected a claim that Rule 52(a) did not apply because the error complained of was "structural":

> Petitioner agues that ... the error she complains of here is "structural," and is outside Rule 52(b) altogether. *But the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure.*

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[45] 96 F3d at 1150. As Judge Kozinski observed, "we are forced to choose from two all-or-nothing rules: the error is *always* harmless or it is *never* harmless. There is no practical middle ground. Given this choice, I believe the Supreme Court would conclude that this kind of error is always harmless."

[46] See e.g. *United States v McFerron*, 163 F3d 952 (CA 6, 1998).

[47] *Johnson v United States*, 520 US 461, 117 S Ct 1544, 137 L Ed 2d 718 (1997).

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> We [have] cautioned against any unwarranted expansion of Rule 52(b)...because it "would skew the Rule's careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed"....Even less appropriate than an unwarranted expansion of the Rule would be the creation out of whole cloth of an exception to it, *an exception which we have no authority to make*.[48]

The remaining argument is that application of a harmless-error rule such as Rule 52(b) or MCL 769.26 will simply always lead to the conclusion that the erroneous preclusion of a peremptory challenge affects a substantial right, or works a miscarriage of justice. But one returns to Judge Easterbrook's reasoning: the substantial right involved is the right to an impartial jury; "[A]fter *McCollum* and *Ross* it is impossible to ground an error concerning peremptory challenges with the denial of counsel or trial before a bribed judge. If the jury that actually sits is impartial, the defendant has enjoyed the *substantial* right."[49] Were it otherwise even the legislature could not alter the number of peremptory challenges,

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[48] 520 US at 466, 117 S Ct at 1548 (emphasis supplied).

[49] 130 F3d at 1229. Judge Easterbrook in *Patterson* allowed that it was possible that a jury-selection process could become so confused as to affect a substantial right; in *United States v Harbin*, 250 F3d 532 (CA 7, 2001) the panel so found, because not only was the process confused, but the prosecution, and the prosecution alone, was permitted to exercise a peremptory challenge *during trial*. The panel concluded that allowing the prosecution unilaterally to use a "pre-trial jury selection tool to alter the composition of the jury mid-trial" affected substantial rights. Cf. *United States v Wilson*, 355 F3d 358 (CA 5, 2003), where no error was found under *Harbin* because both parties had this opportunity to exercise a peremptory challenge at the conclusion of trial.

or abolish them, which is to give them constitutional status though the law is clear that they are a statutory creation.[50]

IV. Conclusion

An accused has a substantial right –a constitutional right– to trial before an impartial jury. Should a challenge for cause be denied erroneously, when, because all peremptory challenges have been used, there is no opportunity for counsel to excuse that juror, then the error in procedure causes a loss of the substantive right. But it must always be remembered that "[P]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement."[51] Where it is possible, as it generally is, for a procedural error to occur without working the violation of a substantial right, then a conviction should not be upset. Indeed, both in the federal system and in Michigan, statutes forbid the setting aside of a conviction in these circumstances. For

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[50] Note that in *Johnson* the trial court had failed to submit an *element* of the crime to the jury for determination beyond a reasonable doubt, as at that time it was believed in the federal system that materiality in a perjury case was the for court not the jury, and the Supreme Court found that the error was subject to plain-error review. Similarly, the Court in *Neder v United States*, 527 US 1, 119 S Ct 1827, 144 L Ed 2d 35 (1999) held that this error was also subject to harmless-error review under Rule 52(b) where the error was preserved. It is difficult to escape the conclusion that if an error in the failure to submit an element of the offense to the jury is capable of harmless-error review, then an error in the exercise of peremptory challenges that does not result in a partial jury is also capable of harmless-error review. Though this court reached a different conclusion from that in *Neder* in *People v Duncan*, 462 Mich 47 (2000), this was where the trial judge failed to instruct on *any* of the elements of the felony-firearm charge; reversal was required because no elements had been instructed upon and it could thus not be said the jury had deliberated at all on the offense (and the People note their view that in the context of a felony-firearm charge, where all elements are instructed upon on the predicate offense, and a gun was used, Chief Justice Corrigan's dissent has the better of the argument).

[51] *Olim v. Wakinekona,* 461 US 238, 250, 103 S Ct 1741, 75 L Ed 2d 813 (1983).

example, arraignment is a procedure that protects a liberty interest –freedom from confinement– but that procedure may be violated in some ways, including not being sufficiently "prompt" under state law, without violating the federal constitutional interest involved.[52]

As cogently put by one federal decision,

> Constitutionalizing every state procedural right would stand any due process analysis on its head. Instead of identifying the substantive interest at stake and then ascertaining what process is due to the individual before he can be deprived of that interest, *the process is viewed as a substantive end in itself.* The purpose of a procedural safeguard, however, is the *protection* of a substantive interest to which the individual has a legitimate claim of entitlement.[53]

Here, the trial judge erred in reaching a conclusion that defense counsel's peremptory challenges were racially motivated before both hearing counsel's explanation for those challenges and determining whether a race-neutral reason was pretextual. But counsel was allowed to make a record, and his reason for the strikes was race-conscious, obviating the need for any judgment regarding pretext and rendering the court's procedural error harmless. Moreover, because the jury that sat has not been alleged, and cannot be alleged, to have been

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[52] See *Watson v City of New York*, 92 F3d 31, 38 (CA 2, 1996), affirming dismissal of civil rights claim based on violation of New York arraignment procedure, finding that the plaintiff's federal constitutional claim was erroneously premised on the proposition that a state law construction of the state arraignment statute itself created a liberty interest protected by the Fourteenth Amendment.

[53] *Shango v. Jurich,* 681 F2d 1091, 101 (CA 7, 1982).

partial, any error in maintaining the jurors on the jury did not violate the substantive right involved –the right to an impartial jury. *Miller* should be overruled, and the conviction here reinstated.

Relief

WHEREFORE, the People request that Court of Appeals be reversed and the conviction reinstated, and the case remanded to the Court of Appeals for resolution of the remaining issues.

Respectfully submitted,

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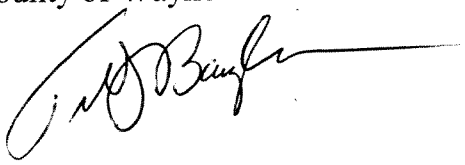

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